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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS
THE HONORABLE BENTLEY PRICE
CIRCUIT COURT JUDGE

Appellate Case No. 2024-000134
Civil Action No. 2023-CP-10-01493

Op. No. 2026-UP-078 (S.C. Ct. App. filed February 18, 2026)

Town of Sullivan's Island, South Carolina; Town of Sullivan's Island Board of Zoning Appeals; and Charles Drayton, in his official capacity as Zoning Administrator,

PETITIONERS,

versus

Pacaso, Inc. and 2 SC Lighthouse, LLC,

RESPONDENTS.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONERS

INTRODUCTION

Every member of 2 SC Lighthouse, LLC must pay Pacaso, Inc. $99 every month; no member can book a stay without it; and a member who stops paying loses the right to use the Property until he becomes current. (R. p. 62; R. pp. 274:24-275:9; R. p. 285:1-13). Regarding that fee, the Return does not defend the factually incorrect majority opinion of the Court of Appeals. It corrects it. The majority described the fee as covering "arrangements for landscapers, cleaners, etc." along with Pacaso's scheduling system. Op. at 3. The Return concedes the fee is "separate from" the operating expenses that cover cleaning, landscaping, and maintenance. (Return at 4, 12). Respondents have confirmed on the record what the majority got backwards, and the correction proves the petition's central point: the majority did not construe an ordinance. It conducted its own *de novo* review of the factual record, found new facts, and found them wrong.

The Return repeats two assertions: "[n]o money changes hands in return for any stay at the Property," and "[t]he owners do not pay to stay at a home they own." (Return at 4-5). Repetition is not evidence. And it does not change the facts. Before the Board, Respondents' own counsel agreed that each member pays "$99 a month . . . ***for the privilege of being able to be assigned a certain number of days***," that no member can book a stay "without the app," and that a member who does not pay forfeits the right to use the Property. (R. pp. 274:24-275:9; R. p. 285:1-13) (double emphasis added). Neither assertion in the Return describes the record. Both contradict it.

The Petition presents three questions: the standard of review that governs a zoning board's use determination, the majority's incorrect reading of this record, and the Board's authority to consider the RS-District provisions of the same ordinance. This reply takes each in turn.

ARGUMENT

I. The Return's objections to review do not hold: the standard-of-review question is of statewide importance, the decision conflicts with settled law, and the dissent goes unanswered.

A. The standard of review under Section 6-29-840(A) is a question of statewide importance, and the majority's departure from it conflicts with settled law.

The standard-of-review question asks whether a reviewing court may set aside a zoning board's determination that an activity constitutes a prohibited use, a determination South Carolina law treats as a finding of fact, by relabeling it a "construction of the ordinance" subject to *de novo* review. That question arises under Section 6-29-840(A), a statute of general application that governs every appeal from every board of zoning appeals in the State. It does not belong to Sullivan's Island, and it will arise in every zoning appeal in which a board applies a defined term to the facts before it.

Nevertheless, the Return characterizes the petition as a request for "error correction, not certiorari," in a dispute over "a single ordinance, unique to the Town, as applied to a single property." (Return at 1). But the error the petition identifies is not a misreading of the Town's text. It is the majority's substitution of its own judgment for the deference Section 6-29-840(A) commands. A holding that a board's application of a defined term to undisputed facts is a matter of "construction," reviewable *de novo*, is not particular to Sullivan's Island. It reaches every ordinance in the State and every board that applies one. If the Opinion stands, the Court of Appeals will have license to ignore the standard and substitute its own view of facts for that of local zoning boards across the State, and litigants will have a new incentive to appeal any decision from a zoning board. They will know that higher courts will conduct *de novo* review of the factual findings.

The Return makes much of the Town's acknowledgment that the governing standard is "settled." (Return at 1, 7). That the standard is settled is the point. In Stanton v. Town of Pawleys Island, this Court reviewed a zoning board's conclusion that the lower level of a beach house was a separate "use," and it set that conclusion aside only because the board had "erred, as a matter of law," in severing the lower level from the structure. 317 S.C. 498, 503, 455 S.E.2d 171, 173 (1995). Reading Stanton, the Court of Appeals has held that "[a] determination by a zoning board that a particular purpose or activity does or does not constitute a 'use' is a finding of fact." Heilker v. Zoning Bd. of Appeals for City of Beaufort, 346 S.C. 401, 412, 552 S.E.2d 42, 48 (Ct. App. 2001); see also id. at 411, 552 S.E.2d at 47-48 (reading Stanton to mean that "a zoning board determination regarding whether a particular activity or purpose constitutes a 'use' of property is a finding of fact"). The majority departed from that settled rule, and a departure from settled law is what Rule 242(b)(3) exists to correct.

The Return also argues that an unpublished opinion "states no competing rule" and therefore cannot conflict with anything. (Return at 10). Rule 242(b)(3) asks whether "the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court," not whether its opinion announces a competing rule. Rule 242(b)(3), SCACR. A judgment that sets aside a board's findings under a standard this Court's precedent forbids conflicts with that precedent whether or not the opinion is published. Judge Thomas's dissent makes clear the majority's opinion is in conflict with the applicable rule. Op. at 4-5 (Thomas, J., dissenting) (concluding the Zoning Administrator and the Board "made factual findings here, not legal conclusions," and that the Board's decision "focused on the facts surrounding the use of the Property, not on the meaning of the ordinance"). This Court's certiorari jurisdiction extends to "a final decision of the Court of Appeals," Rule 242(a), SCACR, and the Rule draws no line between published decisions and unpublished ones. According to the logic of the Return, no unpublished decision could ever warrant certiorari, however serious the error and however final its consequences for the parties bound by it. Rule 242 contains no such limitation.

B. The Return never engages the dissent's actual reasoning.

The Return dismisses the dissent on the ground that a dissent "standing alone" does not warrant review. (Return at 7-8). The dissent does not stand alone. It accompanies a conflict with Stanton and the authority applying it, and a question of statewide importance. And the Return mischaracterizes the dissent it dismisses. It asserts that the dissent "identifies no unsettled or novel rule of law" and would simply have "read the definition more broadly." (Return at 8). That is not what the dissent does. Judge Thomas concluded that the Board "made factual findings here, not legal conclusions," and then did what the majority never did: she went through the record and identified the evidentiary support for each of the Board's three findings, that the program assigned tenancies, that the Property was made available for use in exchange for valuable consideration, and that stays were limited to periods of fewer than twenty-eight days. Op. at 4-6 (Thomas, J., dissenting). The Return responds to none of it. It does not dispute that the record contains the evidence the dissent identified. This is not a bare disagreement about how to read an ordinance. A judge who sat on the panel, reviewing the same record, found evidence supporting every finding the majority set aside. The majority never held that the record lacked evidence to support the Board's decision. It weighed the evidence, made new findings that are unsupported by the record, and came out the other way.

II. The Return confirms the majority's factual errors, repeats its legal one, and never answers the Board's remaining findings.

A. The Return's own facts correct the majority's central factual finding.

The majority described the $99 monthly fee as covering "arrangements for landscapers, cleaners, etc. and the use of Pacaso's 'SmartStay' scheduling system." Op. at 3. The Petition showed the record is to the contrary: the $99 is the scheduling-app fee alone, and Pacaso bills property management separately. (Pet. at 9). The Return agrees. It states that cleaning, landscaping, and maintenance "are paid for through the co-owners' monthly operating expenses," and that the $99 fee is "separate from" those operating expenses. (Return at 4, 12 (citing R. p. 62)). Respondents have confirmed on the record precisely what the majority got backwards. This highlights the folly in appellate courts making their own, new factual findings and the legislature's wisdom in prohibiting such judicial frolicking through the record.

The concession matters for two additional reasons. First, it strips the fee to its essence. Once upkeep is removed, the only thing the $99 buys is access to the booking system, and without the booking system no member may reserve or occupy the Property. (R. pp. 274:24-275:9). The fee is not an upkeep charge that happens to accompany ownership. It is the price of occupancy. Second, the concession proves Petitioners' point regarding the standard of review. The majority decided for itself what the $99 fee covers, decided it wrong, and rested part of its reversal on the answer. A court applying Section 6-29-840(A) does not make its own findings of fact at all, let alone incorrect ones.

B. The Return's defense of the $99 fee fails on its own terms.

The Return argues that "a co-owner pays that fee whether or not he ever stays, and pays nothing further when he does. A recurring charge a co-owner pays regardless of use is not 'valuable consideration' given 'in return for' a short-term stay." (Return at 12). The argument fails for four reasons.

First, it rewrites the ordinance. Section 21-203 does not ask whether a payment is metered by the night. It asks whether a Principal Building is "made available for use, occupancy, possession, sleeping accommodations, or lodging . . . in return for valuable consideration for any period of less than twenty-eight (28) continuous days duration." Zoning Ordinance § 21-203 (R. p. 390). The ordinance's focus is availability in exchange for payment, and the record shows exactly that exchange. A member who pays receives the right to book and occupy the Property for exclusive stays of two to fourteen days per share; a member who stops paying forfeits that right entirely. (R. p. 62; R. pp. 274:24-275:9; R. p. 285:1-13). The Property is made available to a member only in return for the monthly payment. Nothing in the definition requires that the consideration take the form of nightly rent.

Second, the Return concedes that a member "pays nothing further" when he stays. (Return at 12). That concession demonstrates what the monthly payment purchases: the right to the stays themselves. If the fee bought nothing but software, nonpayment would cost a member his software. Instead, nonpayment costs him the Property. Respondents' counsel conceded as much before the Board, agreeing that each member pays "$99 a month . . . for the privilege of being able to be assigned a certain number of days," that no member can book a stay "without the app," and that the roughly $800 the members collectively pay each month is consideration, disputing only its connection to a stay. (R. pp. 274:24-275:9; R. p. 634:15-19). A payment that is a condition precedent to occupancy is a payment in return for occupancy, whatever its billing cycle.

Third, the homeowners' association analogy fails because it leaves out the element that defines a Vacation Rental. (Return at 12). Section 21-203 reaches a building made available for use “in return for valuable consideration for any period of less than twenty-eight (28) continuous days duration.” § 21-203 (R. p. 390). A homeowner who pays association dues is under no such limit. He may occupy his home for twenty-eight days, for a year, or for as long as he owns it, so his dues could not make him a short-term renter under any reading of the ordinance. Under the Pacaso program the length of the stay is the design: a single share buys a stay of two to fourteen nights, back-to-back stays are prohibited, and no stay reaches twenty-eight days. (Return at 4; R. pp. 171-172; R. p. 202; R. p. 288:12-15). That is the distinction the ordinance draws, and the analogy omits it. Association dues do not buy a short stay, and the $99 fee buys nothing else. As Respondents’ counsel put it to the Board, “use rights get suspended if you don’t pay the fee.” (R. p. 285:1-13; R. pp. 274:24-275:9).

Fourth, Pacaso’s characterization of the fee was an argument for the Board, not a ground for appellate factfinding. Whether the $99 payment, on this record, is “valuable consideration” paid “in return for” the use of the Property was the very question the Board was charged with deciding. The Board heard the evidence, including Respondents’ concessions, and found the element satisfied. (R. p. 97). Under Section 6-29-840(A), that finding must be treated “in the same manner as a finding of fact by a jury,” and it may be set aside only if it is arbitrary, capricious, without reasonable relation to a lawful purpose, or an abuse of discretion. <u>Restaurant Row Assocs. v. Horry County</u>, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999).

Pacaso’s competing description of what the fee buys is a dispute about what the evidence shows, and disputes about what the evidence shows are resolved by the board that heard the evidence, not by an appellate court reviewing the record *de novo*.

C. The $99 fee does not stand alone in the record.

The $99 fee has been a focal point of the Board's findings, but it is not the only way the program makes Pacaso money as part of its membership stay program. The record also shows that a member pays a substantial purchase price for a membership interest and that Pacaso collects a twelve-percent transaction fee on the initial sale of those interests. (R. p. 203; R. pp. 161-163, 174). Pacaso then runs an exchange program (and presumably collects another transaction fee), where members can trade their interest in one LLC for an interest in another (and stay at the property belonging to that second LLC). (R. p. 204; R. p. 321:1-5; R. pp. 338:1-339:3). The exchange program is notable because it means when someone buys into the Pacaso membership program, they have the flexibility to transfer the membership to a different property. Their stays are not necessarily limited to the property at issue in this case. The Return's argument regarding valuable consideration addresses only the $99 fee and the monthly operating expenses. It does not address the other payments at all, though they are part of the same program and documented in the record. Money changes hands at the outset, through the purchase price and Pacaso's transaction fee, and every month thereafter, through the $99 payment without which no stay may be booked. On that record, the Board could reasonably find, and did find, that the Property is put to commercial use and made available in return for valuable consideration. (R. p. 97).

D. Assignment for tenancies independently sustains the Board's decision, and neither the majority nor the Return confronts it.

Section 21-203 is written in the disjunctive. A Vacation Rental is "[t]he commercial use of a Principal Building(s) that is: (1) rented, leased, assigned for tenancies; or (2) made available for use, occupancy, possession, sleeping accommodations, or lodging for one or more persons in return for valuable consideration for any period of less than twenty-eight (28) continuous days duration." § 21-203 (R. p. 390). Either prong standing alone makes the Property a Vacation Rental, and the Board found both. (R. p. 97). The majority's holding reached only the second prong, concluding that the arrangement "does not constitute commercial use of the Property for accommodations in return for valuable consideration." Op. at 4. It never asked whether the program assigns tenancies. That finding therefore stands untouched, and it sustains the Board's decision on its own.

Regarding that finding, the Return merely argues that there is no landlord, there is no tenant, the co-owners merely schedule "among themselves," and the management agreement disclaims any arrangement conferring recurring use rights. (Return at 14 (citing R. p. 60)). What the Return never does is address the operative facts, most of which it concedes in its own counter-statement. A member books an exclusive stay of two to fourteen nights per membership. (Return at 4; R. pp. 171-172; R. p. 202). Every other member is excluded from the Property during a booked stay, and back-to-back stays are prohibited. (R. p. 202). And the scheduling rules are not set by the members "among themselves" at all. The record shows Pacaso "shall have the right to establish and alter the system by which usage rights and reservations are allocated among the Owners." (R. p. 60); Op. at 6 (Thomas, J., dissenting). The question the Return never answers is the one that matters: why is an exclusive, Pacaso-administered possessory period of fewer than twenty-eight days, from which all others are excluded, not a tenancy? The Board found assigned tenancies. (R. p. 97). The dissent found record support for that finding. Op. at 5-6 (Thomas, J., dissenting).

E. The majority's ownership premise was wrong as a matter of law, and the Return repeats it.

Ownership is not an element of Section 21-203. The definition asks how a Principal Building is used, not who holds title to it. The majority nonetheless made ownership the pivot of its holding on valuable consideration, describing the members as "co-owners . . . of the Property" who "possess at least a one-eighth-interest" and reasoning that "the owners do not pay to stay at their own property." Op. at 3-4. Because the occupants owned the home, on that view, nothing they paid could be payment for its use. The premise is wrong as a matter of law. 2 SC Lighthouse, LLC holds title, and under the South Carolina Uniform Limited Liability Company Act a member "is not a co-owner of, and has no transferable interest in, property of a limited liability company." S.C. Code Ann. § 33-44-501(a); (Pet. at 10). Further, as discussed above, membership does not allow members to use the Property other than during those times when they have been assigned a stay of between two and fourteen nights, and only if they remain current on their payments to Pacaso.

The Return's answer is that title is irrelevant because "zoning regulates the use of land, not its ownership." (Return at 13). That is a response to an argument the Town never made. The Town has never contended that owning a home through an LLC violates anything. The Zoning Administrator, the Board, and the circuit court each rested on use, as the dissent documents. Op. at 5 (Thomas, J., dissenting). It was the majority, not the Town, that put ownership at issue in this case.

And the Return parrots the majority's error. It repeats throughout that the members "co-own and control 100%" of the home. (Return at 3, 14). That phrase is plucked from Pacaso's marketing, drawn from its own website materials (R. p. 139; R. p. 150), and it is the characterization Section 33-44-501(a) proves errant. The distinction is not a technicality. This is not an owner occupying his own house. It is a participant paying a manager every month for exclusive short stays in a house a separate legal entity owns.

III. The Zoning Administrator's email is not part of the evidentiary record, and it decides nothing.

The Return devotes a full section of its counter-statement, and much of its narrative, to a June 9, 2022 email from the Zoning Administrator. (Return at 5-6). The email was never part of the record before the Board. Respondents obtained it through a FOIA request while their circuit court appeal was pending and moved to supplement the record with it; the circuit court denied the motion; and the email appears in the appellate record only as an exhibit to that denied motion. (R. pp. 420-460; R. pp. 8-12). No tribunal has admitted it into evidence. The only judge of the Court of Appeals to address it, Judge Thomas, found no abuse of discretion in the circuit court's ruling, noting that the circuit court stated its conclusion would remain the same even if it considered the email. Op. at 7-8 n.4 (Thomas, J., dissenting).

Even if it were part of the record on appeal, the email is a preliminary impression, sent the same day a neighbor complained and more than four months before the Zoning Administrator completed his review and issued the October 21, 2022 determination from which this appeal was taken. (R. pp. 407-415). An official's early, informal reaction does not change the ordinance, does not bind the Town, and does not convert the Board's later findings into legal error. And the email does not say what Respondents need it to say. In the same message, the Zoning Administrator described the Pacaso arrangement as a "circumvention of this temporary vacation use" and reported that the Town's legal team was working on strategies "to block" it. (R. p. 428). His preliminary view was that the program was an effort to evade the prohibition, not that it was a permitted use of the Property. That the Return must build its themes of "admission" and "political pressure" on material outside the record says a great deal about the record itself.

IV. The majority's RS-District holding conflicts with Section 6-29-800(E) and with Clear Channel.

The Petition also challenges the majority's separate holding that the Board lacked appellate jurisdiction to consider the RS-Single Family Residential District provisions of the Zoning Ordinance because the Zoning Administrator's determination letter did not cite them. Op. at 4. By statute, the Board on appeal "has all the powers of the officer from whom the appeal is taken" and may "reverse or affirm, wholly or in part, or . . . modify" his determination. S.C. Code Ann. § 6-29-800(E). Applying that statute, the Court of Appeals has held that a board is not confined to the single provision the administrator identified but may "apply the appropriate provisions of the zoning ordinance as dictated by the facts before it." Clear Channel Outdoor v. City of Myrtle Beach, 360 S.C. 459, 465, 602 S.E.2d 76, 79 (Ct. App. 2004), aff'd, 372 S.C. 230, 642 S.E.2d 565 (2007). The Property sits in the RS District. (R. p. 50). The district's stated intent is to preserve "one single family, primarily owner-occupied dwelling per lot" and "to discourage any encroachment by commercial, or other uses." § 21-19(A) (R. p. 155). Its prohibited uses separately include Vacation Rentals. (R. p. 159). The Zoning Administrator addressed the RS District at the hearing, and Respondents had a full opportunity to respond. (R. p. 251:15-17); (Pet. at 13-15).

The Return's answer is that the question is "non-outcome-determinative" and therefore not a basis for certiorari. (Return at 15). That is so only if the Town prevails on the Vacation Rental question. The Board rested its decision on two independent grounds, and either one is sufficient. To reverse, the Court of Appeals had to set aside both. Thus, if this Court were to agree with the majority on the Vacation Rental question, the RS-District holding should be addressed.

The Return proceeds to read Clear Channel to confirm "only that a board may apply the provisions of the ordinance the facts put at issue," and not to permit a board to reach, in the first instance, a violation the administrator never determined. (Return at 15). The Board did no such thing. It applied additional provisions of the same ordinance to the same use of the same Property the Zoning Administrator had already determined was prohibited, which is what Section 6-29-800(E) contemplates in giving the Board "all the powers of the officer from whom the appeal is taken." That those provisions supply an independent ground for the same conclusion does not convert them into a separate violation adjudicated in the first instance. Clear Channel itself held the circuit court "erred in limiting the Zoning Board's review to one section of the City's zoning ordinance." 360 S.C. at 465, 602 S.E.2d at 79. The lack of notice argument also fails on this record: the Zoning Administrator addressed the RS District at the hearing, and Respondents answered it. (R. p. 251:15-17). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands[,]" Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 172, 656 S.E.2d 346, 350 (2008) (citing S.C. Dep't of Soc. Servs. v. Wilson, 352 S.C. 445, 452, 574 S.E.2d 730, 733 (2002)), and the Return identifies nothing this situation demanded that Respondents did not receive. Ultimately, a rule confining a board to the provisions the administrator's letter happens to cite is a construction of Section 6-29-800(E) that would restrict the authority the General Assembly conferred on local boards and invite reversal whenever an administrator's initial letter does not catalog every section of the code his determination implicates.

CONCLUSION

Town Staff, the Board of Zoning Appeals, the circuit court, and the dissenting judge of the Court of Appeals agreed on the critical facts. So did Pacaso, whose Return confirms the very fee the majority misdescribed. Two members of the Court of Appeals came up with an entirely new set of facts on their own. That was impermissible.

Members pay Pacaso every month. A member who stops paying cannot book and cannot stay or use the Property. Stays are exclusive, capped by share, and administered by Pacaso under rules Pacaso may alter. And the $99 fee is separate from the operating expenses the majority believed it covered. Those concessions confirm both that evidence supports the Board's findings and that the majority made findings of its own, incorrectly, under a standard of review that permits neither. Petitioners respectfully request that this Court grant the Petition for Writ of Certiorari, reverse the decision of the Court of Appeals, and reinstate the circuit court's order affirming the Board of Zoning Appeals; or, in the alternative, grant the petition and set the matter for briefing.

Respectfully submitted,

s/ James W. Clement

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